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13 *Attorneys for Plaintiff Cisco Systems, Inc.*

14
UNITED STATES DISTRICT COURT

15
NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

16
17 CISCO SYSTEMS, INC.,

CASE NO. 5:14-cv-5344-BLF

18 Plaintiff,

**CISCO'S OBJECTIONS TO ARISTA'S
12/6/2016 TRIAL EXHIBITS AND
DEMONSTRATIVES**

19 vs.

20 ARISTA NETWORKS, INC.,

Dep't: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

21 Defendant.

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Case No. 5:14-cv-5344-BLF

CISCO'S OBJECTIONS TO ARISTA'S 12/2/2016 TRIAL EXHIBITS AND DEMONSTRATIVES

1 Cisco objects as follows to Arista's December 6 trial exhibits and demonstratives.

2 **Dr. John Black.** Cisco objects to Arista's attempts to use Dr. Black to introduce into
 3 evidence a large set of third party documents¹ and summaries based on similar documents.² These
 4 documents were not authored by either Cisco or Arista. They were also not produced by a third
 5 party as a result of a subpoena; they are of unknown origins and Dr. Black cannot reasonably
 6 authenticate them or otherwise lay an adequate foundation for their admission into evidence. They
 7 are also hearsay. Consistent with the Court's rulings about the proper requirements for evidence
 8 that is sought to be introduced through expert witnesses, this evidence should be excluded.

9 In preparation for this trial, the parties negotiated a Stipulation Regarding Exhibits. ECF
 10 659. The parties stipulated that documents produced by third parties in response to subpoenas
 11 were authentic and admissible as business records. ECF 658-1. Four of the documents Arista has
 12 disclosed fall into this category, and Cisco does not object to their admission or use.

13 However, what limited information there is available to Cisco regarding the remaining
 14 third-party documents disclosed in connection with Dr. Black raises serious questions about their
 15 origin. At his deposition, Dr. Black explained that, at least in some cases, he did not even collect
 16 these documents from the internet (or wherever else they came from) himself. Instead, he testified
 17 that "Arista's lawyers would say here are some more to consider, and they would give me the
 18 manuals produced by those vendors." Ex. A, Black Dep. Tr. 6/30/2016 196:22-24. Cisco, and
 19 indeed Dr. Black, has no knowledge as to how and from where these documents were selected and
 20 collected. Many of them apparently originated with third parties, such as Dell, that were
 21 subpoenaed in this litigation and produced some documents, but not these ones. Whatever process
 22 brought these materials to Dr. Black's attention is inadequate to serve as the basis for
 23 authenticating documents of unknown authorship and origin and submitting them to the jury.

25 ¹ The following Exhibits are third party documents to which Cisco objects: 5246, 5247, 5323,
 26 5324, 5325, 5326, 5327, 5328, 6581, 6582, 6586, 6669, 6743, 6801, 6817, 6968, 7302, 7310, and
7315.

27 ² The following Exhibits are the summaries to which Cisco objects: 5626-5643, 9041, 9042,
 28 9047, 9049, 9052, 9053, 9056, and 9061.

1 These facts present a good faith challenge to the authenticity of these documents, which should be
 2 excluded.³ ECF 659 at 1.

3 These third-party documents are also hearsay: they are out of court statements offered for
 4 the truth of the matter asserted, because if not true they would provide no valid basis for Dr.
 5 Black's opinions. No witness is available to testify as to how, by whom, and when these
 6 documents were created, whether their creation was a regular activity, how they were maintained,
 7 or whether they were relied upon in the course of business. Fed. R. Evid. 803(6). Dr. Black is not
 8 a proper custodian of these documents; indeed, he did not even collect these documents himself.
 9 Arista's proposal, to have Dr. Black submit to the jury a number of documents authored by
 10 unknown parties and collected by its attorneys using unknown methods, does away with the dual
 11 protections of the authenticity and hearsay requirements in one instant.

12 The same inability to prove authenticity or survive a hearsay challenge applies to the
 13 summary exhibits disclosed for use with Dr. Black. These exhibits are summaries which either
 14 compare Cisco CLI commands with other vendors' commands or list commands that "overlap"
 15 between Cisco and other vendors. Dr. Black testified that he learned the commands available in
 16 other vendors' products "by examining user manuals." Ex. A, Black Dep. 6/30/2016 213:18.
 17 These appendices are thus deficient to the same extent, and for the same reason, that the
 18 underlying materials are deficient. Fed. R. Evid. 1006 Moreover, many of the vendors compared
 19 and analyzed in these exhibits do not appear elsewhere in the case: the only information we have
 20 as to them comes from Dr. Black's analysis of materials presented to him by Arista's lawyers.

21 As the Court has recognized, the fact that an expert relied upon certain evidence in
 22 reaching an opinion does not render that evidence authentic or admissible. Fed. R. Evid. 703.
 23 Before Dr. Almeroth testified, Arista objected to Cisco's use of emails authored by Arista

25 ³ One way that an exhibit's authenticity can be established is by an expert witness's
 26 "comparison with an authenticated specimen." Fed. R. Evid. 901(b)(3). The Notes of the
 27 Advisory Committee indicate that this method of authentication originated in the context of
 28 handwriting or signature comparisons. The third-party documents at issue do not contain a similar
 quality that Dr. Black could objectively and expertly compare in order to authenticate one
 document on the strength of another.

1 employees. ECF 690 at 2. When the parties raised this issue before the Court, the Court stated
 2 that “most of them were e-mails and I’m actually not used to experts introducing documents like
 3 this.” ECF 695, Trial Tr. 11/30/2016 846:18-20. Cisco heeded the Court’s words and did not seek
 4 to introduce these statements by Arista employees through Dr. Almeroth. The same result should
 5 obtain here, particularly because the documents to which Cisco objects are from third parties and
 6 thus are not admissible under Fed. R. Evid. 801(d)(2).

7 Cisco also objects to the summary exhibits discussed above on the basis that any use of
 8 these appendices violates the Court’s ruling regarding Cisco’s proposed Exhibit 4796 and Arista’s
 9 agreement that the Court’s ruling as to that exhibit would apply to the exhibits to be used with Dr.
 10 Black. ECF 699, Trial Tr. 12/1/2016 1153-56. These exhibits are summaries which list “Disputed
 11 Cisco Command[s]” against other vendors’ “Command Syntax” or state that the commands used
 12 by Cisco and another vendor overlap. Dr. Black testified that he generated these appendices “by
 13 examining user manuals.” Ex. A, Black Dep. 6/30/2016 213:18. That is to say, he performed the
 14 same exercise Dr. Almeroth performed to generate the excluded Exhibit 4796.

15 Cisco also objects to the demonstratives disclosed for Dr. Black. Slides 12, 13 and 30 of
 16 his presentation exceed the scope of his report, slide 17 uses the argumentative word “common,”
 17 slide 22 references a non-admitted exhibit to which Cisco has objected, and slides 28-30 state an
 18 improper legal conclusion and use the argumentative term “substantiality.” The demonstrative
 19 chart contains commands no longer in the case, use the argumentative word “common,” and
 20 should be excluded in its entirety to the same extent as Dr. Black’s summary exhibits.

21 **Jeffrey Chase.** Cisco objects to Exhibit 5988 on the basis that it is of no or limited
 22 relevance to any matters before the jury. Fed. R. Evid. 402, 403. Because patent validity is not at
 23 issue, this document has at best limited probative value and would be confusing to the jury.

24 **Michael Volpi.** Cisco objects to Exhibit 5622 on the basis that it is inadmissible hearsay.
 25 Fed. R. Evid. 802. Cisco also objects to the remaining exhibits to the extent Mr. Volpi, who was
 26 served with a subpoena for relevant documents but did not produce any and disclaimed having
 27 any, *see* Ex. B (subpoena) & C (Volpi Dep.), is not able to adequately lay a foundation for his
 28 knowledge of confidential internal Cisco documents.

1 Dated: December 5, 2016

Respectfully submitted,

2 /s/ John M. Neukom

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